

October 28, 2008

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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 08-2571

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U.S. DISTRICT COURT
NEW JERSEY

In Regard to the Matter of:

Bayside State Prison

OPINION/REPORT

Litigation

OF THE

SPECIAL MASTER

MICHAEL WASHINGTON

-vs-

WILLIAM H. FAUVER, et al,

Defendants.

* * * * *
TUESDAY, OCTOBER 28, 2008
* * * * *

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

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Transcript of proceedings in the above

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matter taken by Theresa O. Mastroianni, Certified

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Court Reporter, license number 30X100085700, and

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Notary Public of the State of New Jersey at the

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United States District Court House, One Gerry Plaza,

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Camden, New Jersey, 08102, commencing at 2:30 PM.

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MASTROIANNI & FORMAROLI, INC.

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Certified Court Reporting & Videoconferencing

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856-546-1100

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2 A P P E A R A N C E S:

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1 JUDGE BISSELL: The first of these
2 matters is the case involving Michael Washington,
3 08-2571. This opinion/report is being issued
4 pursuant to the directives of the Order of Reference
5 to a Special Master and the Special Master's
6 Agreement, and the guiding principles of law which
7 underlie this decision to be applied to the facts
8 upon which it is based as set forth in the jury
9 instructions in the Walker and Mejias jury charges.
10 And also in this case to prior decisions of the court
11 including those reflected in Judge Kugler's Biaz
12 opinion regarding exhaustion of available
13 administrative remedies to the extent applicable to
14 the allegations of Mr. Washington.

15 As finalized after review under Local
16 Civil Rule 52.1, this transcript will constitute the
17 written report under paragraph seven of the Order of
18 Reference to a Special Master.

19 Because I find that this case is barred
20 by Mr. Washington's failure to exhaust available
21 administrative remedies within the contemplation of
22 the PLRA, I'm not going to dwell at length on the
23 substance of his claim. I do note briefly, however,
24 in order to make a complete record, that I do find
25 that, absent failure to exhaust, he would have

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1 prevailed in connection with his claim for the use of
2 excessive force.

3 I find that the evidence regarding how
4 he was treated in his bunk, and I need not go into it
5 in any great detail, is that appropriate discipline
6 was employed in the sense of lifting up his arm or
7 elbow as a means of making sure that he obeyed orders
8 in terms of lying on his bunk, facing the wall. That
9 amount of force was reasonable and appropriate.

10 However, for him then to have been
11 kicked in the back was indeed the employment of
12 excessive force not only, in fact, as far as its
13 absolute lack of necessity for the purpose of
14 enforcing the orders of the officers, but also as a
15 matter of law, as that term has been well defined in
16 the jury instructions which we've incorporated by
17 reference.

18 Now, on September 12th decision was
19 reserved in this matter with regard to Mr.
20 Washington, because I wanted to study the record
21 fully regarding the presence of an administrative
22 procedure remedy at East Jersey State Prison. Judge
23 Kugler's prior decisions had not dealt with that
24 facility specifically, and thus I wanted, as I said,
25 to take a more detailed study of the record.

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1 I deal first with the question of the
2 so-called fear factor as to whether or not to file an
3 administrative remedy form, and if that fear is
4 genuine and soundly based, whether it could be said
5 that under those circumstances the remedy or
6 administrative remedy was not, in fact, available
7 within the contemplation of the statute. I'm
8 prepared to accept that in an appropriate case,
9 whether we are dealing with remedy procedures at
10 Bayside or with procedures present at other
11 institutions that could have been relayed and applied
12 to a Bayside incident, there could be circumstances
13 where that type of fear, particularly if the record
14 showed direct instigation or threats by prison
15 authorities, could excuse the filing and seeking of
16 administrative remedies. However, in Mr.
17 Washington's case and on these facts, I find that
18 that is absent.

19 First, I find that it is not credible
20 for him to express or allege any fear of the filing
21 of an ARF at Bayside, because evidence in the record
22 reveals that he reported both his injury and the
23 cause of it to personnel at the infirmary. If indeed
24 there is any fear of retaliation from the processing
25 or presentation of such complaints, that argument it

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1 seems to me is pretty much gutted, at least in this
2 case, by the fact that he made those protestations
3 and direct attributions to medical personnel. So
4 that he has not established, in my view, any adequate
5 basis for fear of retaliation had he pursued the
6 administrative remedies available to him while he was
7 at Bayside.

8 Furthermore, he was later transferred
9 to East Jersey State Prison and testified that he
10 felt safer there. Therefore, he was in a position to
11 pursue and file administrative remedy forms at East
12 Jersey. It was stipulated here that if called, an
13 administrative witness familiar with the
14 circumstances at East Jersey would have testified
15 that, under the policy present in the East Jersey
16 handbook, which was introduced here into evidence as
17 Exhibit D-392, and known to all inmates there, the
18 execution of an administrative remedy there regarding
19 an incident at Bayside would have been relayed to
20 authorities that could have investigated it as a
21 Bayside offense.

22 Now, the actual administrative remedy
23 terms appearing at page 24 on Exhibit 392 do not
24 expressly state that that remedy could be employed
25 regarding grievances at other institutions. But it

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1 doesn't preclude them either, and we've had some
2 examples of evidence in this record as it's evolved
3 over time to indicate that in some instances an
4 institution makes it quite clear that its
5 administrative remedy procedures are available only
6 for incidents at that facility. There is no such
7 limitation here in the East Jersey State Prison
8 handbook.

9 Indeed as Judge Kugler found in his
10 Biaz opinion dated May 19th of 2008, it's the Bayside
11 handbook which states specifically that complaints
12 not relevant to conditions within the jurisdiction of
13 Bayside State Prison or that do not affect the
14 complaintant personally shall not be considered. So,
15 there is a place where the handbook does have those
16 limits. Judge Kugler found that there were no such
17 limitations at either Northern State or New Jersey
18 State Prisons, and I've determined here that
19 similarly there were no such limitations at East
20 Jersey.

21 I find, therefore, that the remedy was
22 available to Mr. Washington, not only at Bayside as I
23 mentioned before, but also when he was at East
24 Jersey, and that he failed to take advantage of it in
25 either situation or either setting.

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1 Also as I brought to everybody's
2 attention in the Thurston case, but in order to
3 complete the record here, it's been determined that
4 September of 1999 essentially marks the demarcation
5 line, shall we say, for the exercise of
6 administrative remedies, there being as best I recall
7 a fourth amended complaint filed at that time, prior
8 to which administrative remedies would have to be
9 exercised in order for an exhaustion argument not to
10 be raised. And as I already mentioned, Mr.

11 Washington had opportunities both at Bayside and at
12 East Jersey State Prison leading up to that date.

13 In fact, he was incarcerated at East
14 Jersey from and after April 22, 1999, according to
15 the records here. Indeed, he was even back at
16 Bayside for a couple of months between February and
17 April of 1999, long after the events in question.

18 Accordingly, for the reasons set forth
19 above, I make the determination in this case that as
20 to Mr. Washington, the requirement to exhaust
21 administrative remedies as required by statute 42USC,
22 Section 1997(c)(a) has not been complied with by this
23 prisoner. He did not exhaust such administrative
24 remedies as were available to him at the relevant
25 places and the relevant time period in this matter.

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1 Finally, although not every item of
2 evidence has been discussed in this opinion/report,
3 that is predominantly because, as I've mentioned
4 before, in light of the bar of the exhaustion
5 doctrine here, I did not find it necessary to develop
6 in great detail findings of fact or conclusions of
7 law with regard to Mr. Washington's substantive
8 allegations. I did note, for purposes of generating
9 a complete record here, that, had his claim not been
10 barred by doctrine, he would have sustained his cause
11 of action. I do not, however, undertake the
12 hypothetical exercise at this time of calculating
13 damages that might have ensued.

14 Accordingly, I recommend in this report
15 that the District Court enter an order and judgment
16 of no cause for action against Mr. Washington.

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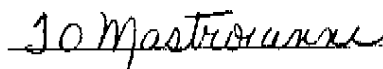
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C E R T I F I C A T E

I, Theresa O. Mastroianni, a Notary Public and
Certified Shorthand Reporter of the State of New
Jersey, do hereby certify that the foregoing is a
true and accurate transcript of the testimony as
taken stenographically by and before me at the time,
place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a
relative nor employee nor attorney nor counsel of any
of the parties to this action, and that I am neither
a relative nor employee of such attorney or counsel,
and that I am not financially interested in the
action.



Theresa O. Mastroianni, C.S.R.

Notary Public, State of New Jersey

My Commission Expires May 5, 2010

Certificate No. X10857

Date: October 28, 2008

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